



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JANUARY 24, 2023

IN THE MATTER OF:

Appeal Board No. 626130

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective March 2, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by DAVID R HERMAN CPA PC prior to March 2, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed October 6, 2022 (), the Administrative Law Judge denied the employer's application to reopen A.L.J. Case No. 022-15755 and continued in effect the decision that case, which overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked for an accounting firm as a senior staff accountant. The claimant's scheduled hours were Monday through Friday from 8:30 AM to 4:30 PM. Because of the COVID-19 pandemic, the claimant was allowed to split her time between working at her home and at the office. The claimant was already working for the firm when a new owner took over effective January 1, 2022.

The new owner found that he was dissatisfied with the claimant's productivity, job performance, and attitude toward him. He told the claimant that he needed her to work at the office full time. The claimant told the owner she "bent over backwards" to come to the office three days per week. The owner proposed having the claimant work part-time on an hourly basis if she could not work five days in the office, and he offered to pay her to work in the office three days. The claimant said she could work in the office on Saturdays and Sundays. Much of this communication took place by text message on February 28, 2022. The claimant wrote to the owner saying this conversation needed to happen in person.

On the morning of March 1, 2022, the owner sent the claimant a text message that said, in part, "I don't think you and I see things eye to eye, you have raised the voice to me multiple times and you are very confrontational which makes it very uncomfortable to discuss issues or me demanding work done. I have tolerated that but I would not tolerate an attitude from you. I need you to pack today and go home. I no longer see you as part of my team."

On the day of the initial hearing held July 15, 2022, the employer's owner preset the office phones to forward all calls to his personal cell phone, and he waited for the Judge's phone call to start the 8:00 AM hearing. When he did not receive a phone call by 8:08, he called his office to ask whether any phone calls had come in, and his staff member advised him that there had been no calls. When he did not receive a call by 8:30 AM, he called the Hearing Section and was told that the Judge had tried to call him, but the call had not gone through. The employer applied to reopen by letter received by the Appeal Board on July 26, 2022.

OPINION: The credible evidence establishes that the employer was waiting for the Judge's phone call for the 8:00 AM hearing on July 15, 2022, but the Judge's phone call did not reach him. The employer's owner had forwarded his office phones to his personal cell phone, and he called the Hearing Section when he received no phone call by 8:30 AM. His application to reopen was received at the Appeal Board on July 26, 2022. These facts establish good cause for the employer's failure to appear, and the application to reopen was submitted within a reasonable time. Accordingly, we conclude that the employer's application to reopen is granted.

The credible evidence further establishes that, at the time when the employer discharged the claimant on March 1, 2022, the claimant had not refused to

return to the office full time as the employer required. While the employer contends that the claimant refused to return, the claimant's responses to this directive included an assertion that she was already bending over backwards for the employer, an offer to work in the office on Saturday and Sunday, and a request to discuss the matter in person rather than by text message. None of these responses constitute a refusal to return to the office. In our view, the claimant was still negotiating over the matter. Therefore, on this record, the claimant was discharged for reasons that do not rise to the level of misconduct for purposes of the Unemployment Insurance Law. Accordingly, we conclude that the claimant's employment ended under non-disqualifying circumstances, and the claimant is allowed benefits.

DECISION: The decision of the Administrative Law Judge is modified as follows and, as so modified, is affirmed.

The employer's application to reopen 022-15755 is granted.

The initial determination, disqualifying the claimant from receiving benefits, effective March 2, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to March 2, 2022 cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER